Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

No. 00-5250

Wesley Aaron Shafer, Jr.

Petitioner,

v.

State of South Carolina,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

1. South Carolina has failed to reconcile the decision below with Ramdass v. Angelone.

Just five weeks before this Court's decision in Ramdass v. Angelone, 120 S.Ct. 2113 (2000), the South Carolina Supreme Court held in this case that, with a few exceptions, South Carolina capital defendants no longer enjoy the protection of Simmons v. South Carolina, 512 U.S. 154 (1994). As petitioner has already pointed out, Pet. for Cert. at 18-19, Ramdass removes any possible doubt concerning the applicability of Simmons to the current South Carolina sentencing scheme. The Attorney General of South Carolina nevertheless emphasizes a phrase from Justice Kennedy's plurality opinion which, he believes, supports the judgment below. This is the statement that Simmons does not extend "to cases where parole ineligibility has not been established as a matter of state law at the time of the jury's future dangerousness deliberations in a capital case." 120 S.Ct. at 2119 (emphasis supplied by respondent). What the state overlooks is that under the current South Carolina sentencing procedure, "the time of the jury's future dangerousness deliberations in a capital case" does not arrive until after the jury's unanimous finding of at least one statutory aggravating circumstance. S.C. Code § 16-3-20(C). Indeed, the jury is not permitted to sentence at all until it first finds an aggravating factor rendering the defendant eligible for the death penalty. Id. ("If the jury does not

unanimously find any statutory aggravating circumstance or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation."). If, however, a statutory aggravating circumstance is found, S.C. Code § 16-3-20(B) clearly provides no alternative to the death penalty other than life imprisonment without the possibility of parole ("if a statutory aggravating circumstance is found, the defendant must be sentenced to death or life imprisonment.").

As the Ramdass plurality made clear, "Simmons applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." 120 S.Ct at 2122 (emphasis added). South Carolina has abolished parole and requires capital sentencing juries to decide whether to impose life instead of death. Simmons applies just as much to this scheme as it did to the narrower "two-strikes" no-parole provision at issue in Simmons itself. South Carolina's decision to the contrary is in conflict with Simmons and Ramdass, and warrants summary reversal.

2. With respect to the state's alternative "future dangerousness" contention, the Court should either (a) remand this case to permit the state court to address the state's argument in the first instance or (b) grant review to make clear that the due process rule of Simmons cannot be defeated by the state's purported distinction between evidence and argument on the issue of a defendant's future dangerousness.

As an alternative reason to deny the writ, the state urges that Simmons does not control this case because the prosecution did not "argue" future dangerousness. BIO at 29-33. As petitioner has already pointed out, Pet. for Cert. at 3, n. 2, South Carolina is a non-weighing jurisdiction in which the prosecution is free to prove, and the jury free to consider, the defendant's potential for dangerousness even though that factor is never formally alleged by the state. In this case the prosecution did formally allege future dangerousness in its pretrial notice of evidence in aggravation.[1] At petitioner's sentencing hearing, the state presented most of the evidence listed in the pretrial notice as supporting that factor, including petitioner's prior history of felony sexual abuse convictions, his persistent

[1]The state argues that its pretrial future-dangerousness notice is irrelevant to the Simmons issue because the document was not provided to the sentencing jury. BIO at 31. This misunderstands petitioner's reason for citing it. The notice is relevant because it shows that the prosecution itself believed that its penalty phase evidence proved the nonstatutory factor of future dangerousness, and said so explicitly. This candor gave way to the present semantic hairsplitting only at that point in the proceedings when the state began to focus on the possibility of evading the due process rule of Simmons.

violations of probation, his alleged lack of remorse for the murder, and his explosive response to a minor frustration even within the highly restrictive confines of the county jail. The state nevertheless insisted on direct appeal that the "future dangerousness" requirement of Simmons is not met because the prosecution refrained from asking the trial jury to draw from the state's evidence the commonsense conclusion that petitioner would likely be dangerousness in the future if not executed.

In rejecting petitioner's Simmons claim, the state supreme court did not even mention this alternative argument by the state, much less accept it. The fact that the state court based its decision on a far-reaching constitutional reinterpretation of Simmons suggests that it found no merit to the state's narrower, fact-based "dangerousness" claim. Such a refusal to accept the state's argument would be especially understandable given the jury's parole questions, which suggest that the jury did indeed focus on the issue of petitioner's future dangerousness in its sentencing deliberations. The state nevertheless renews the same argument here, urging this Court to deny certiorari on the alternative ground that by avoiding a too-explicit prediction of future dangerousness in its jury summation at sentencing, the prosecution also avoided the rule in Simmons.

Given that the sole basis of the state court's decision below is its obvious misapplication of the life-without-parole

prong of Simmons, the Court may wish to summarily reverse the judgment and remand for reconsideration in light of this Court's intervening decision in Ramdass. This course of action would afford the South Carolina Supreme Court a second opportunity to address the state's alternative, "future dangerousness" contention. See, e.g., Lilly v. Virginia, 527 U.S. 116, 119 S.Ct 1817, 1901 (1999) (remanding for harmless-error consideration). However, such a course does not always lead to a prompt or efficient resolution of federal constitutional claims, at least where, as here, the state court has already demonstrated some reluctance to enforce the federal right at issue. See, e.g., Yates v. Aiken, 474 U.S. 896 (1985) (remanding for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985)); on remand, 349 S.E.2d 84 (S.C. 1986) (error held non-retroactive); rev'd, 484 U.S. 211 (1988); on remand, 391 S.E.2d 530 (S.C. 1989) (error held harmless); rev'd, 500 U.S. 391 (1991). Moreover, to the extent that the plurality and concurring opinions in Simmons can be read to provide any support for South Carolina's insistence that the Simmons right of rebuttal is triggered only by an explicit prosecution jury argument on the subject of future dangerousness, and not by actual evidence of future dangerousness, the Court should use this case to clarify the Simmons rule.

The clearest example of the state's injection of the dangerousness issue in Simmons itself came during the prosecutor's

argument. 512 U.S. at 157, 176. For this reason, the Simmons opinions framed the rule in terms of such argument. E.g., 512 U.S. at 176-77 (O'Connor J., concurring) (Simmons rule not triggered "if the prosecution does not argue future dangerousness."). This phrasing of the rule in Simmons was surely not intended, however, to invite prosecutors to evade Simmons' due process requirement by omitting to mention future dangerousness in jury argument after presenting evidence that assured jury consideration of that factor during deliberations. The rule of fundamental fairness announced in Simmons cannot be defeated simply by removing the dangerousness label from the state's dangerousness case. To the extent that Simmons can be read otherwise, the Court should grant certiorari to make clear that future dangerousness can be put at issue by evidence as well as by jury argument.

CONCLUSION

In this case and in the companion case of State v. Starnes, Op. No. 25120, 2000 WL 576191 (S.C. May 8, 2000), BIO at A-33 to A-37, the South Carolina Supreme Court has declared Simmons v. South Carolina inapplicable to most South Carolina capital sentencing hearings. Until this Court intervenes, South Carolina trial judges will be required by these precedents to conduct capital sentencing proceedings in violation of the rule in Simmons. The Court should grant certiorari and reverse.

Respectfully submitted,

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August 23, 2000

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PROOF OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petitioner's Reply to Respondent's Brief in Opposition to the Petition For a Writ of Certiorari was served upon counsel for the Respondent by mailing one (1) copy properly addressed with postage prepaid this 23rd day of August, 2000, to:

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